

merger application.^{87/} Yet they seek to remain unregulated in the broadband Internet access market, even while wireline providers are subject to asymmetrical unbundling requirements.^{88/} The Commission should hold AT&T and Comcast to their “commitments” by imposing an open access condition on the merged AT&T Comcast in this proceeding.

A. The same conditions imposed on the AOL-Time Warner merger should be imposed here.

The imposition of merger conditions similar to those contained in the AOL-Time Warner FTC Consent Decree and FCC Order would be appropriate here. What AT&T and Comcast lack in content as compared to AOL Time Warner, they more than make up for in subscriber base and footprint. As noted above, *see supra* Part I, that subscriber base and footprint create both incentives and opportunities for the merged AT&T Comcast to discriminate in favor of its chosen ISP and to restrict access to others. In light of “cable operators’ current status as the leading providers of residential broadband services,”^{89/} AT&T Comcast could deprive rival ISPs of meaningful access to over 22 million subscribers by restricting access to the AT&T Comcast system. And as the cable modem market continues to grow, rival ISPs will have an even harder time competing with AT&T Comcast’s offering: given the absence of Internet address portability and inter-system instant messaging, if AT&T Comcast is allowed to confer on an exclusive ISP a significant market share, rival ISPs will have increasing difficulty winning over its customers or commanding other means of broadband access. The reverberations of this

^{87/} *Id.* at 94.

^{88/} *See id.* at 92-95.

^{89/} Cable Modem NPRM at ¶ 78; *see also id.* at ¶ 9 (noting that “[i]n the past year, . . . cable’s lead over DSL has grown.”); Third Broadband Report, Appendix C, Tables 1-4 (showing that not only do cable companies provide the bulk of all broadband services, but they have recently been increasing their market share as well).

ultimately would be felt in the Internet content markets as well, as the pool of viable ISPs became narrower.

B. AT&T's past arguments against multiple-ISP access are no longer viable.

In the TCI and MediaOne transfer proceedings, AT&T staunchly opposed any conditions that would interfere with its dominion over the merged entities' cable plant. AT&T primarily argued that: (1) broadband Internet access services do not constitute a market separate from Internet access services generally; (2) the requested conditions could not be implemented in a technically feasible manner; and (3) economic analysis demonstrated that the requested conditions would be likely to harm the public interest by delaying the deployment of broadband services.^{90/} After the FCC's AOL-Time Warner Order, none of these arguments remains viable.^{91/}

First, both the Commission^{92/} and the Department of Justice^{93/} have recognized that "the market for aggregation, promotion, and distribution of broadband content and services" is

^{90/} See TCI Order at ¶ 76; *see also* MediaOne Reply at 68-108 (making identical arguments).

^{91/} AT&T also argued in its earlier license transfer proceedings that the open access debate was outside the scope of the merger and that the Commission lacked legal authority to impose an access condition. See TCI Order at ¶ 76. The Commission rejected both of those arguments in its AOL-Time Warner Order. See Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd. 6547 at ¶ 81 (2001) ("AOL-Time Warner Order") (finding that the Commission had a duty to address the harms posed by the merger). Failing deregulatory action by the Commission with respect to DSL, the imposition of an open access condition in this case would be particularly appropriate, given that the condition would specifically address the harms that would arise from the lack of open access on the part of the tremendous cable modem giant the merger would produce. See *id.*, Separate Statement of then-Commissioner Powell (imploing the Commission to "identify specific harms and craft[] conditions in response to them.").

^{92/} AOL-Time Warner Order at ¶ 56 ("We find in particular that these services constitute a relevant product market distinguishable from residential narrowband Internet access services."); *see also id.* at ¶¶ 69, 71, 73.

^{93/} *United States v. AT&T Corp.*, Case No. 1:00CV01176, Competitive Impact Statement (D.D.C., filed May 25, 2000), at 9.

distinct from the narrowband Internet service market.^{94/} There simply is no basis to modify the agencies' prior determinations,^{95/} and indeed the applicants here suggested none.

Second, AT&T's past assertions that an ISP access condition would be technically impossible to implement have been belied by events. AOL Time Warner apparently is capable of providing multiple-ISP access on its facilities,^{96/} as it is required to do by the FTC Consent Agreement and the Commission's AOL-Time Warner Order. AT&T Comcast can surely do likewise. Indeed, AT&T has recently conducted a multiple-ISP access trial in Boulder, Colorado: "AT&T Broadband has concluded a successful six-month trial of multiple Internet service providers over its cable network"^{97/} After concluding the technical stage of the "Broadband Choice" trial, AT&T declared: "We have demonstrated that we can successfully overcome the technical challenges of connecting multiple ISPs to a hybrid fiber-coaxial network."^{98/} And Comcast likewise is able to provide multiple ISP access: "We ended exclusivity; it will end in the month of December [2001]. . . . We have mentioned previously, we are committed to multiple ISP's [sic]. We are doing a trial in Philadelphia; that is going well."^{99/}

^{94/} *Id.*

^{95/} As Qwest showed in its comments in the Broadband Nondominance NPRM, the distinctions between the two markets are increasing, as broadband content becomes more common and robust. *See Comments of Qwest Communications International Inc.*, filed in CC Docket No. 01-337 on March 1, 2002, at 19-20.

^{96/} Cable Modem NPRM at ¶ 26; *see also Broadband Education Needed*, Television Digest, Nov. 12, 2001 (discussing AOL Time Warner's "recent rollout of multiple ISPs in various markets around the country").

^{97/} AT&T News Release, *AT&T Broadband ISP Choice Trial a Success*, June 7, 2001, available at <http://www.att.com/press/item/0,1354,3849,00.html>.

^{98/} *Id.* (comments of Susan Marshall, senior vice president of advanced services of AT&T Broadband).

^{99/} Aug. 1, 2001 Conference Call (filed by Comcast with the SEC as a Form 425 on Aug. 2, 2001), at 6-7.

Moreover, the companies reiterated their technical ability to provide multiple-ISP access in their merger application.^{100/}

Third, multiple-ISP access will not cause economic hardship, and is instead economically viable.^{101/} When AT&T, in anticipation of the collapse of @Home, built its “Broadband Choice” network, it designed the network specifically to support multiple-ISP access.^{102/} And AT&T has proclaimed that its business plan features multiple ISPs: “Broadband Choice, to be commercially deployed nationwide in 2002, will enable customers to purchase services from multiple ISPs offered over AT&T’s cable systems.”^{103/} Thus, AT&T apparently has come to terms with the economics of such access, and can certainly not be heard to argue here that mandated access would cause economic hardship.^{104/}

C. The FCC can and should neutralize this harm through a simple, procompetitive condition.

Of course, AT&T’s declared willingness to engage in multiple-ISP access does not ensure that it will do so — especially as this merger increases its incentives to discriminate

^{100/} See Comcast Application at 93-94.

^{101/} See TCI Order at ¶ 89.

^{102/} Ex Parte Notice of AT&T Corp., filed in GS Docket 00-185 on Dec. 18, 2001, at 5-6.

^{103/} Reply Comments of AT&T Corp., *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, filed in GS Docket 00-185 on Jan. 10, 2001, at 11; see also Comments of AT&T Corp., filed in GS Docket 00-185 on Dec. 1, 2000, at 50 (“AT&T plans commercial deployment of the new Broadband Choice service nationwide [by] about [May 1, 2002].”); MediaOne Order at ¶ 183 (“Applicants have further committed to provide unaffiliated ISPs with direct access to the merged firm’s cable systems.”); December 20, 2001 Joint Analyst Meeting (filed by AT&T with the SEC as a Form 425 on Dec. 21, 2001), at 10 (“[Broadband Choice is] designed to support multiple ISP’s [sic] and the benefit of that to us is we can create a very robust marketplace for the wholesaler market for ISP’s [sic] and that will be a spectacular development over the next few years, we believe.”).

^{104/} A point the company, to its credit, recognizes: “AT&T Broadband and Comcast have significant incentives to offer their customer[s] a choice of ISPs.” Comcast Application at 93.

against rival ISPs. Nor does the economic feasibility of multiple-ISP access guarantee that any access the merged company offers to rival ISPs will be provided on reasonable terms. Absent the imposition of an open access condition here, AT&T may be tempted to offer rival ISPs “‘take it or leave it’ agreements based on terms that would render it difficult if not impossible for these ISPs to provide service over cable profitably.”^{105/} As the FCC found was the case with the merged AOL Time Warner, AT&T Comcast “‘would have the incentive to discriminate against unaffiliated ISPs on its cable network and . . . would have ability to do so in a manner that would undermine competition in the relevant market.”^{106/}

Accordingly, the FCC should either deny the requested license transfers or approve them with conditions that will keep the public from being harmed by the merged entity’s denial of ISP access.^{107/} Such conditions are easy to construct, as the Commission found in its AOL-Time Warner Order. A simply structured “good faith access” condition can create a world in which purchasers will realize the benefits of a competitive market for the provision of broadband cable access. The Commission therefore should impose here – on what will be by far the largest cable company in the country – essentially the same facilities access requirements that the Commission imposed on the second-largest cable company last year.^{108/} That is, the Commission should expressly require AT&T Comcast to “engage with [unaffiliated] local and regional ISPs in a good faith, non-discriminatory manner.”^{109/} This will create a flexible and fair

^{105/} AOL-Time Warner Order at ¶ 87.

^{106/} *Id.* at ¶ 86.

^{107/} *See* 47 U.S.C. §§ 214(c), 303(r) & 310(d).

^{108/} AOL-Time Warner Order at ¶ 126.

^{109/} *Id.* at ¶ 97.

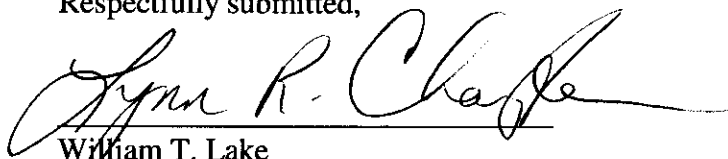
regulatory environment that will nurture a competitive marketplace for the provision of Internet access services over cable broadband facilities.

The proposed condition is far less onerous than the requirements to which Title II carriers are subject, and thus the condition would by no means entirely or even significantly remedy the asymmetrical regulatory regime of which Qwest complains. To alleviate that imbalance, the Commission should either defer approving this merger until it has established a broadband regulatory framework that truly embraces competitive neutrality, or condition approval on AT&T Comcast's commitment to abide by any rules that the Commission concludes should govern wireline DSL and VDSL providers' facilities and services. Regardless, however, of how the Commission rectifies the regulatory asymmetry between cable and wireline video and broadband providers, an open access requirement is necessary here, because it would be arbitrary and capricious for the Commission to leave the powerful entity that will emerge from this merger subject to lesser requirements than the far smaller AOL Time Warner.

CONCLUSION

For these reasons, Qwest respectfully submits that approval of the proposed transfers will not be in the public interest unless the Commission promptly eliminates the regulatory disparity between the merged entity and its wireline broadband and video competitors, and conditions approval of the transfers on the imposition of an open access condition.

Respectfully submitted,



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LIST OF APPENDICES

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1. John Haring, Jeffrey Rohlfs and Harry M. Shooshan, *Anticompetitive Effects of the Proposed AT&T/Comcast Merger*, April 29, 2002.
2. Declaration of Dennis W. Carlton, April 26, 2002.